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No. 90-26

IN THE

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana, *et al.*,

Petitioners,

v.

GLEN THEATRE, INC., *et al.*; and DARLENE MILLER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I.

The following points reply to the contentions of respondents and *amici* on Question I, whether the barroom-style nude dancing[1] of the respondents is "speech" under the First Amendment.

[1]"Barroom-style nude dancing" encompasses the "go-go" or striptease dancing before the Court in this case; the Seventh Circuit defined the "nude dancing" in this case as "non-obscene nude dancing of the bar-room variety performed as entertainment." *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1082 n. 2 (7th Cir. 1990) *(en banc)* (Pet. App. 3). The Glen Theatre respondents have never alleged or proven that their dancing is significantly different from that presented on the videotape, and their term "performance dance" is overinclusive. (Glen Th. Br. at 6 n. 2.)

A. Prior Decisions of This Court Have Not Held That Nude Barroom-Style Dancing is "Speech" Under the First Amendment.

The respondents and *amici* supporting them rely on prior decisions of this Court as authority for their position that nude barroom-style dancing is protected by the First Amendment.[2] This issue was argued in the Petition for Certiorari (at 8-10) and by *amici* in support of petitioners (Br. *Amicus* of Amer. Fam. Assoc., et al. at 13-14), and the petitioners continue to rely on those discussions for the proposition that those decisions did not decide or intimate a ruling on the issues presented here.

B. The Dancing in This Case is Not "Speech".

With variations on the mantra "inherently expressive," the respondents and *amici* supporting them contend that because dance is a recognized art form which can communicate, it follows that *all* live dance before an audience is "speech" under the First Amendment.[3] But when dealing with a medium that *is conduct* (unlike painting, films, or music), and which is broadly defined to encompass any conceivable body movement which expresses emotion (with or without rhythm, accompaniment, or design), this approach begs the question, and makes First Amendment protection available to every claim that "I was just dancing" ("I was just expressing emotion nonverbally"). The slippery

[2]They cite *California v. LaRue*, 409 U.S. 109 (1972); *Doran v. Salem Inn*, 422 U.S. 922 (1975); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. _____, 110 S.Ct. 596 (1990).

[3]Glen Th. Br. at 13 ("performance dance is inherently 'expressive' "); Miller Br. at 4 ("dance is an established form of meaningful movement whose purpose is by nature communicative"); Br. *Amicus* of ACLU, et al. at 8, 10 ("dance performances have long been an important mode of expressing and communicating a wide variety of ideas and emotions"; "dance performance . . . is expressive by its very nature"); Br. *Amicus* of Georgia O.P. & Lounge Assoc. at 8 ("dance itself is a form of expression").

slope is foretold by the assertion of *amici* that "the most basic human emotions are often best expressed in nonverbal form precisely because they are so basic and thus frequently difficult to verbalize." (Br. *Amicus* of ACLU, et al. at 8.)

It is not possible to legally define "dance" in a way that excludes all conduct, because all conduct expresses emotion. The respondents and *amici* have failed to suggest such a definition. For them, anything that can be called "dance" is "speech", whether performed on the stage of the Kitty Kat Lounge, or by its customers in the aisles, or on the streets of South Bend. Their suggestion of an intermediate level of "speech", made up of forms which are "inherently expressive," is unsatisfactory for the same reason.

That is why the elements of intent, message, perception, and context are crucial in distinguishing "speech" from "nonspeech". An artist or speaker is such because she makes a *conscious* (intentional) effort to create art or to communicate, not because someone might later find unintended artistic value or message in her work.[4] Message, perception, and content lend credence to a claim of artistic or communicative intent.

[4]"Art" has been defined as "the *conscious* use of skill and creative imagination esp. in the production of aesthetic objects." Webster's New Collegiate Dictionary, *s.v.* "art" defn. 4a (1981) (emphasis supplied); or "[t]he *conscious* production or arrangement of sounds, colors, forms, movements, or other elements in a manner that affects the sense of beauty; specifically, the production of the beautiful in a graphic or plastic medium." American Heritage Dictionary of the English Language, *s.v.* "art" defn. 2 (1981) (emphasis supplied).

Post-modern art may be "anti-message" or even "anti-art" (Br. *Amicus* of Georgia O.P. & Lounge Assoc. at 16 n. 2), but it is still intended to affect our sense of the aesthetic. As one critic recently argued, "shock art" is not art when its sole intent is to shock; rather, the great modern artists intend "to explore the boundaries of what is known — which is to say, to experiment with new forms in the hope of extending human consciousness." The result may be shocking, but that does not mean that anything that shocks is art. R. Brustein, "The Avant-Garde and Shock Art," *The New Republic*, Nov. 19, 1990 at 26.

The ability to ascribe *ex post facto* notions of art to mere conduct could not be better illustrated than by respondent Darlene Miller, who until she filed her brief in this Court was "just dancing." *Glen Theatre v. Civil City of South Bend*, 695 F.Supp. 414, 420 (N.D. Ind. 1988) (on remand) (Pet. App. 133). Now she says that her nude dancing is "a dramatization that sensuality is not shameful." (Miller Br. at 10.) If she had credibly asserted an "intent to dramatize" in the district court, Miller might be able to argue now that her conduct was "speech", but she presented no such evidence below, and the district court expressly found no "theatrical or dramatic context." 695 F. Supp. at 419 (Pet. App. 130).

Of course the mere fact that Miller makes money is not conclusive, for artists often intend or hope to benefit financially from their work. Where a dancer's *only* intent is to make money and "entertain", however, her claim that her conduct is "speech" must be rejected.

Respondent Sutro continues to rely on her conclusory and somewhat redundant affidavit ("I . . . have danced nude in an art form I consider to be artistic," J.A. 14), which illustrates the inadequacy of considering only the performer's testimony as to intent and artistic content. More galling is her complaint that the Seventh Circuit dissenters' position is "puzzling given that . . . they did not even see her dance performance." (Glen Th. Br. at 20.) Any deficiency resulting from lack of proof must be held against the party with the burden of proof, and it was Sutro who bore the burden of proving that her dancing was "speech". *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n. 5 (1984).

The mere presence of an audience cannot be a determinative factor,[5] for it would extend First Amendment protection to any spectacle which is curious enough to attract onlookers. *Amici* ACLU, et al. suggest that the presence of an audience distinguishes these dancers from a person strolling nude in a public park. (Br. *Amicus* of ACLU, et al. at 10.) Under this analysis, however, the nude stroller gains First Amendment protection when a crowd gathers, and the professional dancer loses his as the patrons file out. It would also follow that ballroom dancers who do not come within the First Amendment, *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), come within the Amendment when other couples pause to watch them, or even when they watch each other. Audience is an important element of context, including the reason why the audience is present and its understanding of the performance, but its presence cannot be dispositive.

[5]The Miller respondents emphasize that their dancing is "before an audience." (Miller Br. at 3.) *Amici* go further and suggest that "[i]f nothing else, the presence of an audience testifies to the fact of communication." (Br. *Amicus* of ACLU, et al. at 10; see also Br. *Amicus* of Georgia O.P. & Lounge Assoc. at 11.)

C. Nudity Is Not "Speech".

The respondents and *amici*, in arguing that *dance* is speech, contend that "symbolic speech" cases such as *United States v. O'Brien*, 391 U.S. 367 (1968); *Texas v. Johnson*, 491 U.S. ____, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); and *Spence v. Washington*, 418 U.S. 405 (1974), apply only to "conduct that is not normally expressive" as opposed to activity "that is expressive by its very nature."[6] Even assuming that one can distinguish between "normally expressive" and "normally nonexpressive" conduct, however, it is obvious that *nudity* is not "inherently expressive" but instead is ordinary conduct. Therefore even the respondents and *amici* should agree that the nudity in this case is not "speech" unless it qualifies as communication under *O'Brien*, *Johnson*, and *Spence*.

[6]Br. *Amicus* of ACLU, et al. at 9-10; see Glen Th. Br. at 25 (arguing that *Spence* applies only to activity "which *is* inherently conduct *only*"); Miller Br. at 4 (dance distinguished from "conduct which might from time-to-time have communicative or expressive qualities.").

Their argument instead is that nudity is protected whenever it is "an integral part of the dancers' expression."[7] Acceptance of this argument would amount to a holding that otherwise criminal conduct becomes protected "speech" whenever it is performed in conjunction with some protected form of expression: public sexual intercourse, marijuana use, or other criminal acts would be "speech" under the First Amendment if performed as "an integral part" of, for example, a protected play. The burden would be on the government to justify its criminalization of this protected conduct.

Of course, one respondent assures the Court that dancing could not contain "sex acts, rape, or even murder" — but only because "overriding governmental interests" in prohibiting such conduct would "outweigh any asserted First Amendment right." (Glen Th. Br. at 36 n. 24.) In other words, the criminal acts would be "speech" if done during a dance, but (thank goodness) would be regulable. But where is the line drawn? Apparently not at crimes which are *mala in se*, since public indecency is such a crime (Pet. Br. at 28-29), and other crimes which obviously could not be committed on stage (such as drug use) are *mala prohibita*.

Glen Theatre also suggests that criminal public nudity is protected when combined with dance because "nudity alone" does not remove First Amendment protection from otherwise nonobscene material, *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981), quoting *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (Glen Th. Br. at 23-24, 36 n. 24). The same could be said, however, of depictions of sexual intercourse, which are also protected if not obscene. *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972) (portrayal of sex is not

[7]Glen Th. Br. at 23; see also Br. *Amicus* of Georgia O.P. & Lounge Assoc. at 11 ("nudity itself is central to [dance's] communication"). Respondent Miller, as noted above, has belatedly asserted that her nudity is "a dramatization that sensuality is not shameful" (Miller Br. at 10), an assertion that is simply not credible at this stage of the litigation.

itself sufficient reason to deny First Amendment protection); see *Miller v. California*, 413 U.S. 15, 24 (1973) (to be obscene, work must depict sexual conduct "in a patently offensive way"). Yet this Court has held that such acts do not retain that protection when performed live. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973); *Arcara v. Cloud Books*, 478 U.S. 697, 705 (1986). For the same reason, live "nudity alone" is conduct outside the First Amendment notwithstanding its connection with allegedly protected dance, unless the nudity itself is "speech" under *Johnson* and *Spence*.

The "nudity alone" cases are inapplicable here in any event, because in *Schad*, *supra*, and the cases cited therein the laws at issue attempted to suppress *entire works* on the basis of nudity within them.[8] In this case the statute at issue does not ban entire dance performances, but only nudity within them.

The Miller respondents attempt to distinguish their nudity from on-stage copulation (Miller Br. at 18) on the basis of two false premises. First, their proposed line separating "sensual" dancing from "sexual behavior" is impossible to draw, particularly where dancers admit that their movements are designed to suggest sex. Second, Miller asserts that any "graphic portrayal of sexual activity in an explicit fashion" is obscene (Miller Br. at 19), an assertion that is obviously incorrect in light of *Kois*, *supra*, and *Miller v. California*, *supra*.

None of the respondents has adequately explained why the dancing in this case could not be performed just as effectively without total nudity. In fact, respondent Miller implicitly acknowledges the *de minimis* impact of Indiana's

[8]In *Schad*, the borough banned all "live entertainment." In *Jenkins v. Georgia*, *supra*, an entire film was declared obscene. In *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975), an entire theatrical production was banned. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), entire movies containing nudity could not be aired at drive-ins.

statute when she argues that it is "difficult to believe that the dignity of women is advanced by . . . pasties and a g-string." (Miller Br. at 11). Miller is wrong about the dignity of women; the ultimate act of exposing nipples and genitals is substantially more degrading to a woman. It *is* difficult to believe, however, that the dancers' alleged glorification of the beauty of the human body is deterred in any significant way by merely covering their nipples, genitals, and buttocks.

II.

The following points reply to the contentions of respondents and *amici* on Question II, whether Indiana's public indecency statute may be validly applied to the respondents' nude dancing even if that dancing is found to be First Amendment "speech".

A. The Decision in *State v. Baysinger* Does Not Preclude a Finding That §35-45-4-1 is Valid As Applied.

Our argument on Question II, that Ind. Code §35-45-4-1 is valid as applied even if nude barroom-style dancing is "speech", is challenged by the Glen Theatre respondents as a "non-sequitur" to our position on Question I that the dancing is not "speech". (Glen Th. Br. at 27-28.) That, of course, is the nature of arguments in the alternative. Beyond that, however, they contend that §35-45-4-1 can never be applied to *any* "speech" after *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1979), and *Dove v. Indiana*, 449 U.S. 806 (1980). Their theory is that *Baysinger* exempted all "speech" from the operation of the statute, and that *Baysinger* is a binding interpretation of state law. (Glen Th. Br. at 28-30.) They are wrong on both counts.

1. *Baysinger* did not hold that §35-45-4-1 is inapplicable to all "speech". It held that

> public nudity itself, . . . without requiring proof of obscenity, is conduct which *traditionally has been held to be public indecency*, which is within the power of the legislature to prohibit. There is no right to appear nude in public. Rather, it may be constitutionally required to tolerate or to allow some nudity as a part of *some larger form of expression meriting protection*, when the communication of ideas is involved.

397 N.E.2d at 587 (emphasis supplied).

Thus the *Baysinger* court distinguished between "traditional[] . . . public indecency" and "larger form[s] of expression," not between "nonspeech" and "speech". It found support for this distinction, no doubt, in this Court's earlier suggestion that "public nudity traditionally subject to indecent exposure laws" would not be protected by the First Amendment. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n. 7 (1975). If *Baysinger* meant to exclude all "speech", the absurd result would be the legalization of public nudity in connection with political protests, or "mooning" with a message.

This interpretation of *Baysinger* is confirmed by the same court's reversal of the Indiana Court of Appeals in *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984), *rev'g* 463 N.E.2d 1121 (Ind. App. 1984) (the "Miss Erotica of Fort Wayne" case). The lower court construed *Baysinger* to have restricted §35-45-4-1 to conduct "which is not primarily expressive in nature and is therefore unprotected by the First Amendment." 463 N.E.2d at 1122. The supreme court reversed, finding Erhardt's nudity to be "conduct squarely within the prohibitions of the statute." 468 N.E.2d at 225. Thus it is clear that *Baysinger* did not exempt from the operation of §35-45-4-1 everything that might be characterized as "expression" or "speech".

2. The so-called "*Baysinger* exception" would not be binding on this Court in any event, because it was clearly based on the Indiana Supreme Court's interpretation of federal law, not state law. While state court interpretations of state statutes are binding on federal courts if based on principles of state law,

> this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying

> interpretation of federal law. In some instances, a state court may construe a state law narrowly to avoid a perceived conflict with federal statutory or constitutional requirements.

Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 152 (1984), *after remand* 476 U.S. 877 (1986).

Baysinger's narrowing construction of §35-45-4-1 was based solely on the Indiana Supreme Court's concern that such a construction was necessary to avoid overbreadth under the federal constitution.[9] The court found the First Amendment issue to be a "critical part of the final issue to be decided," and noted that toleration of nudity in larger forms of expression may be "constitutionally required." 397 N.E.2d at 587. The narrowing construction of §35-45-4-1 was expressly based on and consistent with the court's established principle that statutes are "cloaked with a presumption of constitutionality" and will be interpreted, when possible, to be valid. *Eddy v. McGinnis*, 523 N.E.2d 737, 738 (Ind. 1988).

B. The Public Indecency Statute is Content-Neutral As Applied and As Written.

1. The so-called "*Baysinger* exception," finding §35-45-4-1 inapplicable to "larger form[s] of expression meriting protection," 397 N.E.2d at 587, did not transform the statute into a content-based restriction.[10] Judge Easterbrook answered this argument in his dissent below:

> A decision saying that a statute does not apply to protected expression recognizes the supremacy of the Constitution over state law; to acknowledge a limit the

[9]It is so clear that *Baysinger* was based on federal law that further clarification is unnecessary. Of course, this case could not be remanded as was *Three Affiliated Tribes*, although if necessary the Indiana Supreme Court can accept a certified question. Ind. R. App. P. 15(O); *Cocalt v. Carey Canada, Inc.*, 543 N.E.2d 382 (Ind. 1989).

[10]The Glen Theatre respondents and *amici* have so argued (Glen Th. Br. at 32-34; Br. *Amicus* of People for Amer. Way, et al. at 21; Br. *Amicus* of ACLU, et al. at 14-15).

> Constitution imposes on legislation is not to abandon the generality of the law. The rules concerning use of the parks in [*Clark v.*] *CCNV* [*supra*] had exceptions too; the Park Service did its best to accommodate expression, allowing the erection of symbolic tent cities, but drew the line at sleeping (which triggered the regulation forbidding "camping"). Government does not forfeit its entitlement to enforce laws regulating conduct by attempting to facilitate the expression of ideas.

Miller (en banc), supra, 904 F.2d at 1121 (Easterbrook, J. dissenting) (Pet. App. 81).

Also analogous are the sound control guidelines in *Ward v. Rock Against Racism*, 491 U.S. ____, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), in which the event sponsors claimed that the city was "seeking to assert artistic control over performers at the Bandshell by enforcing a bureaucratically determined, value-laden conception of good sound." 109 S.Ct. at 2754. The Court rejected that claim, finding that "the city's concern with sound quality extends only to the clearly content-neutral goals of ensuring adequate sound amplification and avoiding the volume problems associated with inadequate sound mix." *Id.*

The "content-neutral goals" in this case, as previously argued, are deterrence of prostitution, sexual assaults, criminal activity, degradation of women, and other activities which break down family structure. Yes, the distinction drawn in *Baysinger* affects nude barroom and "bookstore" dancers differently from nude dancers in theatrical productions, but "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, *even if it has an incidental effect on some speakers or messages but not others.*" *Ward, supra*, 109 S.Ct. at 2754 (emphasis supplied). It does not take much insight to recognize that the "secondary effects" of nude dancing are more likely to be prevalent at places like the Kitty Kat Lounge or the Chippewa Bookstore than at a production of *Ballet Africains*, regardless of the message or content of each performance. See *City of Renton v. Playtime Theatres*, 475

U.S. 41, 47-50 (1986). It seems obvious, for example, that productions of *Salome* or even *Hair* would be unlikely to inspire patrons to solicit sex from performers or contemplate rape or adultery, or would degrade women, in the same way that would bartop or booth nude dancing. A State's attempt to narrowly tailor its restrictions in response to perceived First Amendment problems should not be discouraged by the automatic application of "strict scrutiny" to every such attempt.

2. If the respondents and *amici* truly want a statute that is content-neutral as they would define that concept, they can have one. It would be easy enough to set aside the "*Baysinger* exception" by legislation or on the ground that it was based on misperceptions of what the First Amendment requires, and take §35-45-4-1 as written.[11] The statute would then apply equally to the Kitty Kat Lounge, the Chippewa Bookstore, the *Ballet Africains*, and *Salome* — it would be utterly content-neutral.

The statute would still be defensible as a reasonable, narrowly tailored "manner" restriction, as were the volume restrictions in *Ward*, *supra* (loudness is to rock music as nudity is to dance). It would also continue to apply only to *live* conduct, not depictions of conduct in books, films, or videotapes.[12]

[11] *Baysinger* is arguably irrelevant on two grounds: (1) it found nude barroom-style dancing to be nonspeech (Question II assumes *arguendo* that the dancing is "speech"); and (2) it did not consider the possibility that §35-45-4-1 is valid as applied to *all* conduct as a reasonable "manner" restriction, possibly because many of the cases clarifying this defense were decided after 1979.

[12] The statute could not be construed to apply to anything but live conduct. Any impression to the contrary from comments of the petitioners' counsel at oral argument below was erroneously given. See *Miller (en banc)*, *supra*, 904 F.2d at 1103-1104 (Pet. App. 45-46) (Posner, J. concurring).

Such a statute would not be "hopelessly overbroad" (Glen Th. Br. at 31), for the statute would not deter entire performances, only nudity within them. A facial overbreadth claim would fail for three reasons: (1) An overbreadth claim is inappropriate because the interests of these dancers would be no different than those of third parties not before the Court. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796-803 (1984). (2) The range of allegedly protected "speech" potentially affected by §35-45-4-1 is quite small when "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Nude dancing in theaters and bars represents only a small fraction of public nudity which even the respondents appear to concede is properly proscribable. (3) The exaggerated examples given by Glen Theatre (Br. 30-31 n. 19) do not show overbreadth. Thong bikinis might be criminal under §35-45-4-1, but wearing them on beaches is not protected by the First Amendment. See *South Florida Free Beaches v. City of Miami*, 734 F.2d 608 (11th Cir. 1984). Closed art classes and Y.M.C.A. showers are probably not "public places,"[13] and showering is not protected by the First Amendment either. Possible disputes over the definition of "discernibly turgid" relate to vagueness, not overbreadth, and have never been raised by the female plaintiffs in this case.

The petitioners have not defended §35-45-4-1 as applied even to ballet and theater productions, because the statute is content-neutral even with the "*Baysinger* exception." In the final analysis, it is doubtful that the respondents and *amici* would actually prefer a statute made "content-neutral" by elimination of the "*Baysinger* exception."

[13] *Baysinger's* definition of "public place" is limited to places freely open and accessible to the public by express or implied invitation. 397 N.E.2d at 582-583. Thus, for example, an enclosed booth in which a single patron closes the door behind him to view a nude performer is not a "public place," because the public at large is excluded from the booth. *Sweeney v. State*, 486 N.E.2d 651 (Ind. App. 1985). Arguably, an art class open only to registered students is also not a "public place" because the public at large is excluded.

C. The Public Indecency Statute is a Reasonable "Manner" Restriction on Erotic Dancing.

The arguments of the respondents and *amici* on this point are answered for the most part in the petitioners' opening brief on the merits. It should be emphasized that § 35-45-4-1 does not ban entire performances, but only requires that the dancers wear minimal covering while performing. Nudity is a "manner" of dancing just as loudness is a "manner" of performing music, see *Ward*, *supra*, although many rock musicians would complain that their music is not as effective when played less loudly.

One erroneous point requires correction: the Glen Theatre respondents assert that under *Baysinger*, *supra*, a protected theatrical performance could be displayed in open places "such as a street corner" where minors could view the nudity therein. (Glen Th. Br. at 38.) Such a performance, however, would be illegal under Indiana's laws which forbid the knowing display of nudity to minors. Ind. Code §§ 35-49-1-5, 35-49-2-2, 35-49-3-3(2).

D. The Issue of Whether Nudity in Erotic Dancing May Be Regulated is Properly Before This Court.

In a footnote, the Glen Theatre respondents contend that the petitioners waived their argument that §35-45-4-1 is a valid regulation of "speech" (Question II) by failing to make the argument in the lower courts. (Glen Th. Br. at 27 n. 16.) Regardless of how the case was argued below, however, Question II is properly before this Court and should be decided on the merits for three reasons.

1. The respondents did not mention this alleged waiver in their brief in opposition to the petition for certiorari in this case. "Nonjurisdictional defects of this sort should be brought to [the Court's] attention *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived." *City of Canton v. Harris*, 489 U.S. 378, 384-385 (1989), quoting *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). This practice has now been incorporated into the Rules of this Court. U.S. Sup. Ct. R. 15.1.

2. The Seventh Circuit expressly decided Question II on the merits. The majority opinion, without even suggesting waiver, concluded after finding nude dancing to be "speech" that "we must next examine whether the Indiana statute is a valid restriction on that protected expression." *Miller (en banc)*, *supra*, 904 F.2d at 1088 (Pet. App. 14).[14] Only one member of the majority, who concurred in both the majority opinion and judgment of the court, suggested waiver after also rejecting the regulation argument on the merits. 904 F.2d at 1089, 1103 (Posner, J. concurring). This Court has consistently found that a constitutional issue passed upon by the court below should be decided regardless of how the issue was argued or raised by the parties. *City of Canton v. Harris*, *supra*; *Jenkins v. Georgia*, *supra*, 418 U.S. at 157.

3. The validity of the regulation of "speech" is fairly included in the First Amendment question raised in this case by the respondents when they filed suit and appealed from the district court. Indeed, the majority below concluded that it had no choice but to address the issue. 904 F.2d at 1088 (Pet. App. 14) ("Our inquiry cannot end here. . . . [W]e must next examine whether the Indiana statute is a valid restriction. . . ."). This case cannot be satisfactorily decided without full consideration of the validity issue. The Seventh Circuit recognized this, and this Court's practice of addressing "fairly included" issues confirms the need to decide the issue in this case. See U.S. Sup. Ct. R. 14.1(a); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 94 n. 9 (1982); *Procunier v. Navarette*, 434 U.S. 555, 559 n. 6 (1978).

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[14] The assertion that the Seventh Circuit "follow[ed] its own precedent in declining to substantively address these issues" is therefore patently incorrect. (Glen Th. Br. at 27 n. 16.)

CONCLUSION

The judgment of the Seventh Circuit should be reversed, and the judgment of the district court in favor of the petitioners (defendants below) should be affirmed.

Respectfully submitted,

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